

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8	SUMMER E. ATKINSON,)	
9	Plaintiff,)	No. CV-10-00236-CI
10	v.)	ORDER GRANTING DEFENDANT'S
11	MICHAEL J. ASTRUE,)	MOTION FOR SUMMARY JUDGMENT
12	Commissioner of Social)	AND DENYING PLAINTIFF'S
13	Security,)	MOTION FOR SUMMARY JUDGMENT
14	Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 19.) Attorney Maureen J. Rosette represents Summer E. Atkinson (Plaintiff); Special Assistant United States Attorney Benjamin J. Groebner represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment, **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and for Supplemental Security Income (SSI) on April 11, 2006. (Tr. 165.) She alleged an onset date of October 1, 2005, and her date of last insured was September 30, 2010. (Tr. 164; 178.)

1 Plaintiff alleged she is disabled due to chronic obstructive
2 pulmonary disease (COPD), asthma, chronic bronchitis, diabetes, and
3 multiple health issues. (Tr. 177.) Her claim was denied initially
4 and on reconsideration. (Tr. 60; 65.) Plaintiff requested a
5 hearing before an administrative law judge (ALJ), which was held on
6 April 29, 2008, before ALJ R. J. Payne. (Tr. 599-637.) Plaintiff,
7 who was represented by counsel, and medical experts Steven Gerber,
8 M.D., and Marian F. Martin Ph.D., testified at the hearing. (Tr.
9 603-36.) The ALJ denied benefits on June 13, 2008. (Tr. 39-51.)
10 Later, the Appeals Council denied review. (Tr. 4-7.) The instant
11 matter is before this court pursuant to 42 U.S.C. § 405(g).

12 **STATEMENT OF THE CASE**

13 The facts of the case are set forth in detail in the transcript
14 of proceedings and are briefly summarized here. At the time of the
15 hearing, Plaintiff was 43 years old with a high-school education,
16 and some formal education in medical office management (Tr. 618.)
17 She lived in a mobile home with her fourteen-year old daughter.
18 (Tr. 619.) Plaintiff has past work experiences as a retail sales
19 clerk, a custodial worker, assistant manager at a Safeway fuel
20 station, and as a medical/legal transcriptionist. (Tr. 632-35.)
21 Plaintiff testified that she stopped working full time because she
22 got sick, and was later fired. (Tr. 632-33.) Plaintiff is 5'9" and
23 weighs 250 pounds. (Tr. 618.) She testified that she has breathing
24 problems and this prevents her from walking distances and from
25 climbing stairs. (Tr. 621.) Plaintiff also testified that the
26 discs in her back are pinching her sciatica nerve, leaving her leg
27 numb, which causes problems with walking. (Tr. 621.) She stated
28 that despite the surgeries on her wrists, she still has some

1 numbness, and little strength. (Tr. 622.) Plaintiff testified that
2 she suffers from headaches and migraines, which are sometimes
3 controlled with medicine. (Tr. 623.) Plaintiff also testified that
4 she likely will take antidepressants for the rest of her life as a
5 result of her 20-years of using methamphetamine. (Tr. 624.)
6 Plaintiff detailed the problems she experiences with her stomach,
7 bowels and menstrual cycle. (Tr. 625-27.) Plaintiff said she is
8 unable to shower more than once per week due to dizziness and
9 weakness. (Tr. 627.) She is also unable to do the dishes, cook or
10 clean. (Tr. 628.) She said she can sit for thirty minutes, stand
11 for 10-15 minutes, carry five pounds, and cannot pick up an object
12 from the floor. (Tr. 630.) Finally, Plaintiff testified that she
13 has no hobbies and does not participate in any activities, groups,
14 clubs or church. (Tr. 628.) She spends her day reading novels,
15 helping her daughter with homework and watching television. (Tr.
16 635-36.)

17 STANDARD OF REVIEW

18 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
19 court set out the standard of review:

20 A district court's order upholding the Commissioner's
21 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
22 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
23 Commissioner may be reversed only if it is not supported
24 by substantial evidence or if it is based on legal error.
25 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
26 Substantial evidence is defined as being more than a mere
27 scintilla, but less than a preponderance. *Id.* at 1098.
28 Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more
than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

1 The ALJ is responsible for determining credibility, resolving
2 conflicts in medical testimony, and resolving ambiguities. *Andrews*
3 *v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's
4 determinations of law are reviewed *de novo*, although deference is
5 owed to a reasonable construction of the applicable statutes.
6 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

7 It is the role of the trier of fact, not this court, to resolve
8 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
9 supports more than one rational interpretation, the court may not
10 substitute its judgment for that of the Commissioner. *Tackett*, 180
11 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
12 Nevertheless, a decision supported by substantial evidence will
13 still be set aside if the proper legal standards were not applied in
14 weighing the evidence and making the decision. *Browner v. Secretary*
15 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
16 substantial evidence exists to support the administrative findings,
17 or if conflicting evidence exists that will support a finding of
18 either disability or non-disability, the finding of the Commissioner
19 is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
20 1987).

21 SEQUENTIAL EVALUATION PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are
25 "under a disability" are eligible to receive benefits. 42
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
27 medically determinable physical or mental impairment"
28 which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological

1 abnormalities which are demonstrable by medically
2 acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a
3 claimant will be eligible for benefits only if his
4 impairments "are of such severity that he is not only
5 unable to do his previous work but cannot, considering his
6 age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled. 20
9 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
10 137, 140-42 (1987). In steps one through four, the burden of proof
11 rests upon the claimant to establish a prima facie case of
12 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
13 920, 921 (9th Cir. 1971). This burden is met once a claimant
14 establishes that a medically determinable physical or mental
15 impairment prevents her from engaging in her previous occupation.
16 20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the
17 presentation of 'complete and detailed objective medical reports of
18 his condition from licensed medical professionals.'" *Meanel v.*
19 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

20 If a claimant cannot do her past relevant work, the ALJ
21 proceeds to step five, and the burden shifts to the Commissioner to
22 show that (1) the claimant can make an adjustment to other work; and
23 (2) specific jobs exist in the national economy which claimant can
24 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*
25 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

26 ALJ'S FINDINGS

27 At step one of the sequential evaluation process, the ALJ found
28 Plaintiff has not engaged in substantial gainful activity since

1 October 1, 2005, the alleged onset date. (Tr. 41.) At step two, he
2 found Plaintiff has the following severe impairments: obesity,
3 chronic obstructive pulmonary disease, and degenerative disc
4 disease. (Tr. 41.) At step three, the ALJ found Plaintiff does not
5 have an impairment or combination of impairments that meets or
6 medically equals one of the listed impairments in 20 C.F.R. Part
7 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525,
8 404.1526, 416.920(d), 416.925 and 416.926. (Tr. 48.) At step four,
9 he found Plaintiff has the residual functional capacity:

10 [T]o perform light work as defined in 20 CFR 404.1567(b)
11 . . . except she can lift and carry 10 pounds frequently
12 and 20 pounds occasionally. She can sit 3 hours at a time
13 for a total of 6 hours in an 8-hour day. She can stand
14 and/or walk 1 hour in an 8-hour day for a total of 3
15 hours in an 8-hour day. She can frequently engage in
16 repetitive activities with the hands and feet, including
17 operation of foot controls, reaching, handling, fingering,
18 feeling, and pushing/pulling. She can occasionally climb
19 stairs and ramps, but should avoid climbing ladders or
20 scaffolds. She should avoid crawling. She can
21 occasionally engage in stooping, kneeling and crouching.
22 She should avoid exposure to dust, odors, fumes, pulmonary
23 irritants, and extreme cold. She can occasionally be
24 exposed to unprotected heights, moving mechanical parts,
25 and extreme heat. She can frequently operate a vehicle,
26 or be in work situations involving humidity, wetness, and
27 vibrations.

28 (Tr. 49.) The ALJ found Plaintiff is capable of performing past
relevant work as assistant manager/grocery store, gas station and
clerk/cashier pursuant to 20 C.F.R. 404.1565 and 416.965. (Tr. 51.)

23 ISSUES

24 The question is whether the ALJ's decision is supported by
25 substantial evidence and is free of legal error. Plaintiff contends
26 that the ALJ erred by finding her mental impairments were not
27 severe, by rejecting her examining and treating sources and instead
28 adopting the opinion of the reviewing doctor, and by failing to

1 consult with a vocational expert. (ECF No. 14 at 8-15.) Defendant
2 argues the ALJ correctly determined the RFC, properly considered the
3 opinion evidence, and the ALJ was not required to consult with a
4 vocational expert. (ECF No. 20 at 6-17.)

5 DISCUSSION

6 A. Step Two.

7 To satisfy step two's requirement of a severe impairment, the
8 claimant must prove the existence of a physical or mental impairment
9 by providing medical evidence consisting of signs, symptoms, and
10 laboratory findings; the claimant's own statement of symptoms alone
11 will not suffice. 20 C.F.R. § 416.908. The credible medical
12 evidence also must show that the impairment (1) causes functional
13 limitations that have more than a minimal effect on Plaintiff's
14 ability to do work activities, and (2) last more than 12 months. 20
15 C.F.R. §§ 404.1509, 416.909; Social Security Ruling (SSR) 96-03.
16 The fact that a medically determinable condition exists does not
17 automatically mean the symptoms are "severe," or "disabling" as
18 defined by the Social Security regulations. See, e.g., *Edlund*, 253
19 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).
20 An impairment may be found to be "non-severe" when evidence
21 establishes a slight abnormality that has no more than "a minimal
22 effect on an individual's ability to work." SSR 85-28.

23 In determining whether a claimant has a severe impairment the
24 ALJ must evaluate the medical evidence submitted and explain the
25 weight given to the opinions of accepted medical sources in the
26 record. The regulations distinguish among the opinions of three
27 types of accepted medical sources: (1) sources who have treated the
28 claimant; (2) sources who have examined the claimant; and (3)

1 sources who have neither examined nor treated the claimant, but
2 express their opinion based upon a review of the claimant's medical
3 records. 20 C.F.R. § 416.927. A treating physician's opinion
4 carries more weight than an examining physician's, and an examining
5 physician's opinion carries more weight than a non-examining
6 reviewing or consulting physician's opinion. *Benecke v. Barnhart*,
7 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821,
8 830 (9th Cir. 1995).

9 In addition, courts have upheld an ALJ's decision to reject the
10 opinion of an examining physician based in part on the testimony of
11 a non-examining medical expert. *Lester*, 81 F.3d at 831. The
12 analysis and opinion of an expert selected by the ALJ may be helpful
13 in his adjudication, and the court should not second guess the ALJ's
14 resolution of conflicting medical testimony. *Andrews*, 53 F.3d at
15 1041, citing *Magallanes v. Bowen*, 881 F. 2nd 747, 753 (9th Cir.
16 1989). Further, testimony of a medical expert may serve as
17 substantial evidence when supported by and consistent with other
18 evidence in the record. *Id.*

19 Even though medical evidence only is considered at step two,
20 credibility is an appropriate factor to consider in evaluating the
21 medical evidence submitted. When there are conflicts in the various
22 medical reports submitted or questions of credibility, it is the
23 responsibility of the ALJ to resolve those conflicts. *Thomas v.*
24 *Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002). Where the evidence is
25 susceptible to more than one rational interpretation, the findings
26 of the ALJ will be upheld. *Id.* at 954. While the analysis and
27 opinion of an expert selected by an ALJ may be helpful in his
28 adjudication, the ALJ's resolution of conflicting medical testimony

1 is not dependent upon the medical expert's testimony. *Id.* The ALJ
2 is not required to substitute the judgment of a medical expert for
3 his own. *Id.*; see also 20 C.F.R. § 416. 927(e)(2) (no special
4 significance given to medical opinions on issues of severity of
5 impairment or RFC).

6 Plaintiff contends that the ALJ erred by finding that her
7 mental impairments were not severe. (ECF No. 14 at 8.)
8 Specifically, Plaintiff argues that the evaluations of Jay M. Toews,
9 Ph.D., on February 6, 2007, James Pittman, Ph.D., on April 3, 2006,
10 Abigail Osborne-Elmer, MS, on March 31, 2006, joined by Kayleen
11 Islam-Zwart, Ph.D., and John Arnold, Ph.D., on May 9, 2008, provided
12 ample evidence consisting of signs, symptoms, and laboratory
13 findings proving her severe mental impairment, and the ALJ's
14 reliance on Dr. Martin was error.

15 The ALJ's conclusion that no severe mental impairment existed
16 is supported by the record. For example, in February 2006, Dr.
17 Toews diagnosed Plaintiff, in part, with adjustment disorder with
18 anxiety, depression and somatic symptoms, but he noted Plaintiff's
19 test scores revealed good cognitive and memory functioning, and he
20 "strongly suspect[ed] symptom embellishment and disability seeking
21 motivation" by Plaintiff. (Tr. 191-92.) Because Dr. Toews'
22 conclusions were based upon Plaintiff's exaggerated self-reports,
23 credible medical evidence does not support these diagnoses.

24 In March 2006, Dr. Pittman completed a DSHS Physical Evaluation
25 form diagnosing depression and anxiety, and noting that a
26 psychological evaluation was needed. (Tr. 227-28.) Dr. Pittman
27 opined that Plaintiff would be limited to sedentary work, but the
28 limitations on work activities would last only 60 days without

1 treatment.¹ (Tr. 229.) Dr. Pittman's opinion did not meet the
2 threshold test that to be considered severe, an impairment must be
3 expected to last more than twelve months. Thus, this diagnosis does
4 not support Plaintiff's argument that her mental impairments are
5 severe.

6 In May 2006, Ms. Osborne-Elmer, and Dr. Islam-Zwart diagnosed
7 Plaintiff in part with undifferentiated somatoform disorder and
8 adjustment disorder with mixed anxiety and depressed mood. (Tr.
9 251.) The evaluation noted it was difficult to determine if the
10 symptoms were independent of her abstaining from drug use and
11 because Plaintiff was not taking antidepressants, Ms. Osborne-Elmer
12 recommended Plaintiff seek medication to alleviate her symptoms.
13 (Tr. 252.) If Plaintiff's mental impairments could be remedied with
14 medication, these impairments would not be considered severe and
15 Plaintiff's argument to the contrary fails. *Warre v. Commissioner*
16 *of Social Security*, 439 F.3d 1001 (2006) (impairments that can be
17 controlled effectively with medication are not disabling).

18 Finally, after the hearing John Arnold, Ph.D., evaluated
19 Plaintiff and concluded the test results indicated she over-reported
20 and embellished her psychological problems. (Tr. 529.)
21 Nevertheless, Dr. Arnold diagnosed Plaintiff with undifferentiated
22 somatoform disorder, major depressive disorder, recurrent moderate
23 to severe anxiety disorder NOS with generalized features and
24 borderline personality disorder with dependent and antisocial

25 _____
26 ¹ It appears the physical limitations assessed by Dr. Pittman
27 were based upon Plaintiff's recent bout with bronchitis and overuse
28 of her wrist after her surgery. (Tr. 229.)

1 features. (Tr. 531.) Evaluations conducted after an ALJ's adverse
2 disposition are highly questionable. See *Weetman v. Sullivan*, 877
3 F.2d 20, 23 (9th Cir. 1989)(new medical report following adverse
4 administrative decision denying benefits carries little, if any,
5 weight); *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir.
6 1984)(retroactive psychiatric opinions are "notoriously
7 unreliable"). The record supports the ALJ's conclusion that Dr.
8 Arnold's post-hearing evaluation was internally inconsistent and his
9 diagnosis was supported by invalid test results that indicated
10 exaggeration of symptoms and, thus, the ALJ reasonably gave no
11 weight to Dr. Arnold's opinions. (Tr. 47.)

12 Independent review reveals that the ALJ considered all
13 probative medical evidence. As discussed below, the ALJ gave
14 legally sufficient reasons for the weight given acceptable medical
15 source opinions. The ALJ's reasoning is supported by substantial
16 medical evidence in the entire record, as well as inferences
17 "logically flowing from the evidence." *Sample*, 694 F.2d at 642.
18 Thus, Plaintiff's argument that the ALJ erred by failing to find she
19 had a severe mental impairment fails.

20 **B. Evaluation of Medical Opinions**

21 Plaintiff maintains that the ALJ erred by relying on Dr.
22 Martin's testimony, and failed to provide reasons for rejecting the
23 examining and treating sources regarding her mental impairments.
24 (ECF No. 14 at 9.) The Commissioner must provide "clear and
25 convincing" reasons for rejecting uncontradicted opinions of a
26 treating or examining physician. *Lester*, 81 F.3d at 830 (citation
27 omitted). If the opinion is contradicted, it can only be rejected
28 for "specific" and "legitimate" reasons that are supported by

1 substantial evidence in the record. *Andrews*, 53 F.3d at 1043. The
2 ALJ can meet this burden by giving a detailed and thorough summary
3 of the facts and conflicting clinical evidence, state his
4 interpretation of the evidence, and make findings. *Thomas*, 278 F.3d
5 at 957. In any case, the ALJ is not obliged to accept the opinion
6 of a medical source if the opinion is inadequately supported by
7 clinical findings. *Thomas*, 278 F.3d at 956.

8 Here, after a thorough summary of the medical evidence, the ALJ
9 gave specific and legitimate reasons for rejecting the medical
10 source opinions that Plaintiff's mental impairments caused more than
11 minimal limitations in her cognitive and social functioning.

12 **1. Jay Toews, Ph.D.**

13 The ALJ discussed in detail Dr. Toews' report from his March
14 2007 evaluation of Plaintiff. (Tr. 44-45.) Dr. Toews' testing
15 revealed Plaintiff is of average intelligence, has excellent ability
16 to sustain attention and concentration, has consistent pace and was
17 persistent on tasks. (Tr. 45; 190-91.) She also demonstrated good
18 cognitive and memory functioning, and no indication existed that
19 these functions were compromised by mood or affect. (Tr. 45; 191.)
20 Dr. Toews strongly suspected symptom embellishment, and he concluded
21 that Plaintiff was fully competent to function in a wide variety of
22 jobs limited only by exertional factors. (Tr. 45.) Dr. Toews'
23 evaluation does not conflict with the ALJ's determination that
24 Plaintiff can perform light work with certain limitations.

25 **2. James Pittman, Ph.D. ARNP**

26 The ALJ also addressed Dr. Pittman's April 2008 evaluation that
27 indicated Plaintiff could lift and carry 20 pounds occasionally and
28 10 pounds frequently. (Tr. 45; 474.) Dr. Pittman opined that

1 Plaintiff should limit her standing and walking to two hours or less
2 in an eight-hour day, and that she would need to alternate standing
3 and sitting to relieve back spasms. (Tr. 45; 475.) Dr. Pittman
4 also noted limitations in pushing and pulling in the lower
5 extremities, and she should never climb, crawl or stoop. (Tr. 45;
6 475-76.) The postural limitations in the RFC and Dr. Pittman's
7 recommendations are similar, but not identical. (Tr. 49; 475.)

8 Plaintiff's RFC indicates that she can stand/walk for one hour
9 at a time, for a total of two hours in an 8-hour workday, and Dr.
10 Pittman indicated Plaintiff can stand/walk for less than two hours
11 in an 8-hour day. (Tr. 49; 474.) Under the RFC, Plaintiff can sit
12 for three hours at a time, and Dr. Pittman indicates Plaintiff must
13 alternate sitting and standing, without specific reference to time
14 limitations. (Tr. 49; 475.) In sum, Dr. Pittman's evaluation does
15 not contradict the ALJ's determinations that Plaintiff can perform
16 light work, with certain limitations.

17 **3. Abigail Osborne-Elmer, MS and Kayleen Islam-Zwart, Ph.D.**

18 The ALJ reviewed the evaluation from Abigail Osborne-Elmer, MS
19 and Kayleen Islam-Zwart, Ph.D. (Tr. 42-43; 248-56.) The report
20 noted Plaintiff complained of severe depression, but they could not
21 determine if Plaintiff's mood and anxiety symptoms were independent
22 of her substance use. As noted by the ALJ in his reasoning,
23 Plaintiff reported to the evaluators that her most significant
24 barrier to employment was primarily physical in nature, and the
25 doctors recommended a physical evaluation. (Tr. 43; 252.) The ALJ
26 noted that the somatoform disorder diagnosis was apparently based on
27 MMPI results, but that diagnosis requires either the physical
28 symptoms cannot be fully explained by a medical condition or the

1 symptoms are in excess of a physical exam or lab findings. Dr.
2 Martin, the testifying medical expert, opined that somatoform
3 disorder should be "ruled out." (Tr. 46; 497.) The reasons provided
4 by the ALJ for discounting Ms. Osborne-Elmer and Dr. Islam-Zwart's
5 opinion and diagnosis were specific and legitimate. The ALJ did not
6 err.

7 **4. John Arnold, Ph.D.**

8 Finally, the ALJ reviewed the post-hearing evaluation by John
9 Arnold, Ph.D. (Tr. 46-47.) As stated above, the ALJ gave no weight
10 to Dr. Arnold's assessment because his opinions were based upon both
11 test results that suggested symptom embellishment and the self-
12 reporting of a non-credible Plaintiff, and thus his conclusions were
13 internally inconsistent. (Tr. 47-48.)

14 The record supports the ALJ's conclusions. Plaintiff's results
15 from one test administered by Dr. Arnold were invalid due to over
16 reporting of her psychological difficulties and another test
17 suggested symptom embellishment. (Tr. 529.) Additionally,
18 Plaintiff's diagnosis was based largely on self-reporting, and the
19 ALJ determined Plaintiff was determined to be a non-credible source.
20 Plaintiff does not challenge the credibility determination.
21 Finally, the ALJ noted that despite Plaintiff's average memory
22 functioning, intact attention and concentration, Dr. Arnold
23 concluded Plaintiff was significantly limited in those areas. (Tr.
24 48; 529-30; 533.) These constitute specific and legitimate reasons
25 for rejecting Dr. Arnold's diagnosis.

26 **C. Vocational Expert Testimony**

27 Plaintiff argues that the ALJ was required to call a vocational
28 expert because both Dr. Gerber and Dr. Pittman opined that Plaintiff

1 has non-exertional² limitations that would "restrict [her] work
2 capacity." (ECF No. 14 at 15.) Plaintiff relies on *Polny v. Bowen*,
3 864 F.2d 661 (9th Cir. 1988) to support her argument that vocational
4 expert testimony was necessary prior to determining if Plaintiff can
5 engage in her past work. In *Polny*, the issue was whether the ALJ
6 erred by failing to call a vocational expert where the plaintiff's
7 impairment - a severe psychiatric disability - was nonexertional.
8 *Polny*, 864 F.2d at 663. The *Polny* court held that where
9 nonexertional impairments are severe enough to limit the range of
10 work, then the testimony of a vocational expert is necessary to
11 identify specific jobs within the claimant's abilities. *Polny*, 864
12 F.2d at 663-64.

13 *Polny* is distinguishable. In this case, unlike *Polny*,
14 Plaintiff has failed to establish that her nonexertional impairments
15 limited her range of work. Plaintiff noted the slight differences
16 of opinions from Drs. Gerber and Pittman related to nonexertional
17 limits, and summarily concluded "[t]hese nonexertional limitations
18 would also restrict Ms. Atkinson's work capacity." (ECF No. 14 at
19 15.)

20 Non-exertional limitations "affect your ability to meet the
21 demands of jobs other than the strength demands, that is, demands
22 other than sitting, standing, walking, lifting, carrying, pushing or
23 pulling" 20 C.F.R. § 404.1569a. In this case, the ALJ
24

25 ²In support of her argument, Plaintiff cites examples of both
26 exertional and non-exertional limitations expressed by Drs. Gerber
27 and Pittman. (ECF No. 14 at 14.) The context of the argument
28 requires an analysis of only the non-exertional impairments.

1 found that Plaintiff's non-exertional limitations included: (a)
2 frequent engaging in repetitive hand and feet activities, including
3 reaching, handling, fingering, feeling, along with frequent
4 operation of a vehicle; (b) occasional climbing of stairs and ramps,
5 stooping, kneeling, and crouching, exposure to humidity, wetness,
6 vibration, unprotected heights, moving mechanical parts and extreme
7 heat; and (c) avoiding ladders, scaffolds and crawling, dust, odors,
8 fumes, pulmonary irritants, and extreme cold. (Tr. 49.)

9 Where a claimant's only limitation is in climbing and
10 balancing, such a limitation does not ordinarily have a significant
11 impact on the occupational base. SSR 85-15. If a claimant can
12 stoop, crouch and kneel occasionally to lift objects, the light
13 occupational base is "virtually intact." *Id.* Additionally, a
14 claimant must have "significant limitations" of reaching or handling
15 to eliminate a large number of occupations. *Id.* Finally, where a
16 claimant should avoid excessive noise or dust or environmental
17 pollutants, the impact on the occupational base is minimal because
18 "most job environments do not involve great noise, amounts of dust,
19 etc." *Id.*

20 Plaintiff has not shown her nonexertional limitations
21 significantly erode the occupational base. The record reveals
22 Plaintiff has mild restrictions in postural limits and exposure to
23 environmental elements. (Tr. 474-77; 507-12.) Plaintiff reported
24 the only nonexertional requirement of her former job as assistant
25 manager of a fuel station was reaching for two hours per day. (Tr.
26 168-69.) Plaintiff's RFC allows her to return to this work.
27 Because Plaintiff failed to establish that she could not return to
28 her prior occupation, the ALJ was neither required to call a

1 vocational expert nor required to proceed to step five.³ *Matthews*
2 *v. Shalala*, 10 F.3d 678, 681 (1993).

3 CONCLUSION

4 The record supports the ALJ's determination that Plaintiff's
5 mental impairments are mild and therefore properly were
6 characterized as non-severe. 20 C.F.R. §§ 404.1520a(d)(1),
7 416.920a(d)(1); *Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996).
8 The ALJ properly weighed the treating and examining physicians'
9 opinions and gave specific and legitimate reasons for rejecting
10 treating and examining source opinions. Finally, the ALJ was not
11 required to consult with a vocational expert. The ALJ's

12
13 ³At step five, the ALJ took judicial notice that:

14 [V]ocational experts have historically and routinely
15 testified in prior hearings that, given an individual with
16 the same age, education and work experiences as the
17 claimant in this case, the types of exertional and non-
exertional limitations which are present in the case at
hand would not significantly erode the job base at the
light levels.

18 (Tr. 52.) Vocational expert testimony is not a proper subject to be
19 administratively or judicially noticed, is inadequate to satisfy a
20 step five requirement for vocational expert testimony, and is
21 contrary to the Commissioner's policy. SSR 83-10; SSR 83-12. In
22 this case, however, because step five was unnecessary, the error was
23 harmless. See *Stout v. Commissioner Soc. Sec. Admin.*, 454 F.3d
24 1050, 1055 (9th Cir. 2006) (recognizing application of harmless
25 error in Social Security context where a "mistake was nonprejudicial
26 to the claimant or irrelevant to the ALJ's ultimate disability
27 conclusion.").

1 determination of non-disability is supported by substantial evidence
2 and free of legal error. Accordingly,

3 1. Defendant's Motion for Summary Judgment (**ECF No. 19**) is
4 **GRANTED.**

5 2. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
6 **DENIED.**

7 The District Court Executive is directed to file this Order and
8 provide a copy to counsel for Plaintiff and Defendant. Judgment
9 shall be entered for Defendant, and the file shall be CLOSED.

10 DATED November 21, 2011.

11
12 S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE